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SERVICE DATE - NOVEMBER 4, 2003

SURFACE TRANSPORTATION BOARD

DECISION

STB Docket No. AB-441 (Sub-No. 3X)

SWKR OPERATING CO. – ABANDONMENT EXEMPTION – IN COCHISE COUNTY, AZ

Decided: October 31, 2003

By petition filed on July 17, 2003, SWKR Operating Co. (SWKR) seeks an exemption under 49 U.S.C. 10502 from the prior approval requirements of 49 U.S.C. 10903 to abandon a 19.9-mile portion of the Douglas Branch extending from milepost 7.0 (formerly milepost 1040.15), near Curtis, to the end of the line at milepost 26.9 (formerly milepost 1055.8), near Charleston, in Cochise County, AZ (the line). Notice of the petition was served and published in the Federal Register (68 FR 46678-79) on August 6, 2003, instituting an exemption proceeding. The exemption will be granted, subject to historic preservation and standard employee protective conditions.

BACKGROUND

The line is part of the Douglas Branch, which SWKR acquired from Southern Pacific Transportation Company (SPT)¹ in 1994. See SWKR Operating Co., Inc. – Acquisition and Operation Exemption – Southern Pacific Transportation Co., Finance Docket No. 32620 (ICC served Dec. 23, 1994). At that time, the Douglas Branch extended from milepost 1032.84, at Benson, to the end of the line at milepost 1107.96, at Douglas, in Cochise County, AZ.² To date,

¹ SPT was merged into Union Pacific Railroad Company (UP) on February 1, 1998.

² The milepost designation changed at Fairbank from milepost 1050.57 to milepost 1046.39. Included in the 84.9-mile purchase was the Bisbee Branch, which extended 5.6 miles from Bisbee Junction, milepost 1085.00 on the Douglas Branch, to the end of the line at Bisbee, milepost 1090.60.

SWKR has abandoned two portions of the Douglas Branch,³ and as a result, the Douglas Branch now extends from milepost 1032.84 at Benson to milepost 1055.90 at Charleston.

No shippers are currently using the line. There are no shippers located on the line, and there has been no overhead traffic since December 2002. SWKR does not expect future development of the line or a demand for rail service, as 18.65 miles of the line are located within the San Pedro Riparian National Conservation Area. In recent years, SWKR provided overhead service under contract as an accommodation to three shippers: Chemical Lime Corporation (CLC), Ace Hardware (Ace), and GrupoMexico. Traffic for these shippers was as follows: for CLC, 347 carloads of lime, coal, coke, and magnesium chloride in 2001; for Ace, 2 carloads of lumber in 2001, and 4 carloads in 2002; and for GrupoMexico, 1,314 carloads of copper cathodes and copper rod in 2001, and 131 carloads of copper cathodes and 2 carloads of empty pallets in 2002. SWKR states that CLC, Ace, and GrupoMexico have been apprised of the filing and that SWKR does not expect the shippers to oppose the abandonment.

SWKR indicates that a grant of this exemption would allow it to eliminate approximately \$100,000 in annual maintenance costs and allow it to sell or reuse \$650,000 worth of rail, ties, and other track materials.⁴

DISCUSSION AND CONCLUSIONS

Under 49 U.S.C. 10903, a rail line may not be abandoned without the Board's prior approval. Under 49 U.S.C. 10502, however, the Board must exempt a transaction or service from regulation when it finds that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. 10101; and (2) either (a) the transaction or service is of limited scope, or (b) regulation is not necessary to protect shippers from the abuse of market power.

³ In SWKR Operating Co.—Abandonment Exemption—in Cochise County, AZ, Docket No. AB-441 (Sub-No. 1X) (ICC served Oct. 12, 1995), SKWR was granted an exemption to abandon 17.26 miles of rail line including: (1) the entire Bisbee Branch; (2) a segment of the Douglas Branch between milepost 1097.30, near Paul Spur, and milepost 1107.96, near Douglas; and (3) a 1-mile line from milepost 1107.00 to the Mexican Border at Agua Prieta. In SWKR Operating Co. – Abandonment Exemption – in Cochise County, AZ, STB Docket No. AB-441 (Sub-No. 2X) (STB served Feb. 14, 1997), SWKR was granted an exemption to abandon a 41.5-mile segment of the Douglas Branch between milepost 1055.8, near Charleston, and milepost 1097.30, near Paul Spur.

⁴ According to SWKR, UP retained the bridges and underlying right-of-way between milepost 8.31 and milepost 26.9 when it sold the line to SWKR; consequently, SWKR will not incur any costs to remove bridges, and it will not realize any revenue from the sale of the majority of real estate under the line.

Detailed scrutiny under 49 U.S.C. 10903 is not necessary to carry out the rail transportation policy. By minimizing the administrative expense of the application process, an exemption will reduce regulatory barriers to exit [49 U.S.C. 10101(7)]. An exemption will also foster sound economic conditions and encourage efficient management by relieving SWKR of the expense of maintaining and operating a line that is no longer used and by allowing SWKR to use its assets more productively elsewhere on its rail system [49 U.S.C. 10101(5) and (9)]. Other aspects of the rail transportation policy will not be adversely affected.

Regulation of the proposed transaction is not necessary to protect shippers from the abuse of market power. No shippers are located on the line, there has been no demand for overhead service since December 2002, and apparently there is no opposition to the exemption. Nevertheless, to ensure that CLC, Ace, and GrupoMexico are informed of the Board's action, SWKR will be required to serve a copy of this decision on these shippers within 5 days of the service date and certify to the Board that it has done so. Given the market power finding, the Board need not determine whether the proposed abandonment is limited in scope.

Under 49 U.S.C. 10502(g), the Board may not use its exemption authority to relieve a carrier of its statutory obligation to protect the interests of its employees. Accordingly, as a condition to granting this exemption, the employee protective conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979) will be imposed.

SWKR has submitted environmental and historic reports with its petition and has notified the appropriate Federal, state, and local agencies of the opportunity to submit information concerning the energy and environmental impacts of the proposed action. See 49 CFR 1105.11. The Board's Section of Environmental Analysis (SEA) has examined the environmental report, verified the data it contains, and analyzed the probable effects of the proposed action on the quality of the human environment. SEA served an environmental assessment (EA) on September 15, 2003, and requested comments by October 15, 2003.

In the EA, SEA indicated that the Arizona State Parks, State Historic Preservation Office (SHPO), has requested additional information to determine if the property meets any of the National Register's criteria for inclusion in the National Register of Historic Places. Accordingly, SEA recommends that a condition be placed on any Board decision granting abandonment authority that would require SWKR to take no steps to alter the historic integrity of the right-of-way until completion of the section 106 process of the National Historic Preservation Act, 16 U.S.C. 470f (NHPA).

No comments to the EA were filed by the due date. Accordingly, the condition recommended by SEA in the EA will be imposed. The proposed abandonment, as conditioned, will not significantly affect either the quality of the human environment or the conservation of energy resources.

SEA has indicated in its EA that the right-of-way may be suitable for other public uses following abandonment. However, no one has sought a public use condition, and no such condition will be imposed.⁵

It is ordered:

1. Under 49 U.S.C. 10502, an exemption from the prior approval requirements of 49 U.S.C. 10903 for the abandonment by SWKR of the above-described line is granted, subject to the employee protective conditions set forth in Oregon Short Line R. Co. – Abandonment – Goshen, 360 I.C.C. 91 (1979), and subject to the condition that SWKR shall take no steps to alter the historic integrity of the right-of-way until completion of the section 106 process of the NHPA.

2. SWKR is directed to serve a copy of this decision on CLC, Ace, and GrupoMexico within 5 days after the service date of this decision and to certify to the Board that it has done so.

3. An OFA under 49 CFR 1152.27(c)(1) to allow rail service to continue must be received by the railroad and the Board by November 14, 2003, subject to time extensions authorized under 49 CFR 1152.27(c)(1)(i)(C). The offeror must comply with 49 U.S.C. 10904 and 49 CFR 1152.27(c)(1). Each OFA must be accompanied by the filing fee, which currently is set at \$1,100. See 49 CFR 1002.2(f)(25).

4. OFAs and related correspondence to the Board must refer to this proceeding. The following notation must be typed in bold face on the lower left-hand corner of the envelope: **“Office of Proceedings, AB-OFA.”**

5. Provided no OFA has been received, this exemption will be effective December 4, 2003. Petitions to stay must be filed by November 19, 2003, and petitions to reopen must be filed by December 1, 2003.

6. Pursuant to the provisions of 49 CFR 1152.29(e)(2), SWKR shall file a notice of consummation with the Board to signify that it has exercised the authority granted and fully abandoned the line. If consummation has not been effected by SWKR’s filing of a notice of consummation by November 4, 2004, and there are no legal or regulatory barriers to

⁵ Public use requests were due no later than 20 days after publication of the notice of the petition in the Federal Register, or by August 26, 2003.

consummation, the authority to abandon will automatically expire. If a legal or regulatory barrier to consummation exists at the end of the 1-year period, the notice of consummation must be filed no later than 60 days after satisfaction, expiration, or removal of the legal or regulatory barrier.

By the Board, Chairman Nober.

Vernon A. Williams
Secretary